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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION
MASS LITIGATION PANEL

RONALD LEE ABBOTT, *et al.*
Petitioners,

vs.

A-BEST PRODUCTS COMPANY, *et al.*
Respondents.

On Petition For Writ of Certiorari
To the Supreme Court of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court below erred in holding that state tort law claims against manufacturers of parts or components of railroad locomotives are preempted by Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq*.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners to this consolidated action are thousands of current or former railroad employees who contracted an asbestos related disease after exposure to asbestos throughout the course of their employment.

All of the petitioners were original parties to the following actions: Ronal Lee Abbott, et al., v. A-Best Products, et al., (CA. 00-C-43M, Marshall County, WV); Jasper Abbott, et al., v. McJunkin Corporation, et al., (CA. 01-C-54M, Marshall County, WV), Nancy Aills, et al., v. McJunkin, et al., (CA. 02-C-192K), Marshall County, WV); Lawrence O'Neil Andrews, et al., v. McJunkin Corporation, et al., (CA. 02-C-132K, Marshall County, WV); Robert W. Fonner, et al., v. A-Best Products Company, et al., (CA 01-C-212, Brooke County, WV); Billy Joe Lemley, et al., v. Owen-Corming Corp., et al.,(CA. 96-C-216K, Marshall County, WV); Allen Adkins, et al., v. Anchor Packing Co., et al., (CA. 98-CV-428, Marshall County, WV); Charles R. Abbott, et al., v. American Standard, Inc., et al., (CA. 02-C-742-2, Harrison County, WV); Allen Adkins, et al., v. General Motors Corporation, et al., (CA. 02-C-73K, Marshall County, WV); Ralph Aills, et al., v. General Motors Corporation, et al., (CA. 02-C-192K, Marshall County, WV); Lawrence Andrews, et al., v. General Motors Corporation (CA. 02-C-132K, Kanawha County, WV).

The respondents are three manufacturers of railroad locomotives or locomotive parts: Old Orchard Industrial Corporation, Viad Corporation, and General Motor Corporation.

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OPINIONS BELOW

The Trial Court Orders granting Summary Judgment are non-reported opinions and have been attached at Appendix A.

The Order Denying the Petition for Appeal is a non-reported opinion and has been attached at Appendix B.

JURISDICTION

The Order denying the petition for appeal was entered on March 15, 2006. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*, are reproduced at Appendix C.

STATEMENT OF THE CASE

The Petitioners herein respectfully Petition for a Writ of Certiorari to review the judgment of the Trial Court, as directed by the answer to a certified question from the West Virginia Supreme Court. This Statement is based on the facts as presented to the Honorable Arthur M. Recht, the Trial Court judge, and on which his decision was based.

Petitioners in this consolidated action are current and former railroad employees who contracted an asbestos-related disease process after exposure to asbestos throughout the course of their employment. They initially filed Complaints, seeking damages for these asbestos-related diseases, against manufacturers and distributors of asbestos-containing locomotives or locomotive parts; including the Respondents in this action.

The Respondents, in early 2002, had previously filed Motions for Summary Judgment arguing that the claims of the petitioners were preempted by the Locomotive Boiler Inspection Act (LBIA) or (BIA), 49 U.S.C. § 20701 *et seq.*, the Federal Safety Appliance Act (SAA), 49 U.S.C. § 20301 *et seq.*, and the Federal Railway Safety Act (FRSA), 49 U.S.C. § 20106 *et seq.*

The Circuit Court of Kanawha County, West Virginia, by and through The Honorable Martin J. Gaughan, in July of 2002, denied the Motions for Summary Judgment, but certified certain questions to the West Virginia Supreme Court:

> Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by federal law under the Locomotive Boiler Inspection Act 49 U.S.C. § 20701 *et seq.*?
>
> Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by federal law under the Federal Safety Appliance Act 49 U.S.C. § 20301 *et seq.*?
>
> Are state tort law claims against manufacturers of parts or components of railroad locomotives preempted by

federal law under the Federal Railway Safety Act, 49 U.S.C. § 20106 *et seq.*?

The West Virginia Supreme Court answered the first question in the affirmative. See In re: West Virginia Asbestos Litigation, 592 S.E.2d 818 (W.Va. 2003). The West Virginia Supreme Court either failed or declined to answer the second two questions. The aforesaid Petitioners were not able to seek a Writ of Certiorari to the United States Supreme Court at that particular time since a Final Order was not issued; as the West Virginia Supreme Court only answered a certified question.

This decision prompted several defendants, namely Viad Corp, General Motors Corp., and Old Orchard Corporation to renew their Motions for Summary Judgment. The Trial Court granted these motions in reliance on In re: West Virginia Asbestos Litigation, in May of 2005.

The West Virginia Supreme Court of Appeals, on March 15, 2006, denied a Petition for Appeal filed by the Petitioners. The Petitioners now respectfully request that their Petition for a Writ of Certiorari be granted due to the wide and sweeping impact the decision has on thousands of claims.

I. COMPELLING REASONS WHY CERTIORARI SHOULD BE GRANTED

A. THE WEST VIRGINIA SUPREME COURT'S DECISION DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The West Virginia Supreme Court's decision in In re West Virginia Asbestos Litigation, 592 S.E.2d 818 (W.Va. 2003), directly conflicts with this Court's holdings regarding the scope of preemption under the LBIA and SAA in Moore v. Chesapeake & O. Ry. Co., 291 U.S. 205 (1934) and Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934), as well as the nature and effect of federal preemption generally, as explained and developed in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) and subsequent cases.

Specifically, the Petitioners' common law claims against the manufacturers and suppliers of locomotive parts and appurtenances are not preempted by the Locomotive Boiler Inspection Act (LBIA), 49 U.S.C. § 20701 *et seq.*, because this Act merely establishes the standard with which the manufacturers and suppliers need to conform, rather than insulating them from liability for manufacturing and/or supplying asbestos containing parts.

Furthermore, the Petitioners' claims are not preempted because the LBIA does not apply to manufacturers or suppliers. Actions against manufacturers do not fall within the scope of the field occupied by the Act and thus are only preempted if they actually conflict with or frustrate the goals of the federal scheme. Since these actions do not conflict with or frustrate the goals of the Act, preemption does not lie.

Finally, the common law claims of the Petitioners are not preempted by the LBIA since much of the Petitioners' exposure to the asbestos containing products occurred while the locomotives and railcars at issue were not "in use." Since locomotives and railcars not "in use" do not fall within the preemptive scope of the

Act, the common law causes of action can only be preempted to the extent that they conflict with or frustrate the purpose of the federal scheme.

1. THIS COURT'S PRIOR HOLDINGS ESTABLISH THAT THE LBIA OCCUPIES THE FIELD OF SAFETY STANDARDS FOR LOCOMOTIVES, BUT DOES NOT OTHERWISE INFRINGE UPON A PLAINTIFF'S RIGHT TO RECOVER

Any analysis regarding the scope of federal preemption under the LBIA must necessarily begin with a discussion of the history of this statute. What is commonly referred to as the Locomotive Boiler Inspection Act, is actually part of, or an amendment to, the earlier Federal Safety Appliance Act, 49 U.S.C. § 20301 *et seq.*, See Urie v. Thompson, 176 S.W.2d 471 (Mo. 1943); Laughlin v. Lofton, 62 So.2d 745 (Fla. 1953); Fontaine v. National Railroad Passenger Corp., 54 Cal.App.4th 1519 (Cal. App. 3 Dist. 1997).[1] Although both the LBIA and the SAA are to be read *in pari material* with the Federal Employers' Liability Act (FELA), 45 U.S.C. §51, *et seq.*, it is important to note that the first SAA was enacted in 1893, fifteen (15) years before the current version of the FELA even existed. See Kernan v. American Dredging Co., 355 U.S. 426 (1958).

Since the SAA did not provide its own cause of action, any cause of action brought pursuant to that Act had to be brought at common law, or pursuant to some other applicable statute. As the United States Supreme Court has held on numerous occasions, the SAA merely prescribed the duty, or set the standard, in the field of railcar safety. See Moore v. Chesapeake & O. Ry. Co., 291 U.S. 205, 215 (1934)("The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee though the breach of the duty sprang from the principle of common law."); See also, Texas & Pacific R.R. Co. v. Rigsby, 241 U.S. 33, 39-40 (1916). Elaborating further, the Moore

[1] While currently codified separate from one another, because what is now referred to as the LBIA was actually an amendment to the SAA, this Court's decisions interpreting the preemptive scope of the SAA are highly relevant if not equally applicable to any analysis under the LBIA.

Court explained, "The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights." Moore, 291 U.S. at 215. Thus, at least at the time of the SAA's original enactment, it can be safely assumed that Congress did not intend to preempt any common law rights belonging to injured employees, since those common law rights were the only vehicle in place that allowed potential plaintiffs to enforce the federal standards they had created.

This Court expanded even further on its Moore decision later that same year in the case of Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934), a case which should, for all intents and purposes, resolve the question of whether the SAA and LBIA preempt common law tort causes of action. In Gilvary, a railroad employee injured in the furtherance of intrastate (not interstate) commerce attempted to bring a personal injury action against his railroad employer under the laws of Ohio, despite an agreement between the parties to be bound by the Ohio worker's compensation laws. The railroad objected to the action, arguing that the action should be resolved within the worker's compensation system, and the employee countered that the SAA prevented (or preempted) the application of worker's compensation law. Thus, the question as properly before this Court was whether the SAA itself serves to preempt the application of state worker's compensation laws for a violation of SAA standards. In holding that the SAA does not prevent the application of worker's compensation laws, the Supreme Court engaged in a detailed discussion of the SAA's purposes and objectives. In so doing, it held unequivocally that the SAA, which also incorporates the LBIA, serves merely to establish a federal standard for safety, and does not in any way effect the manner in which an employee seeks compensation for a violation of those standards. As declared by the Court, "These acts do not create, prescribe the measure, or govern the enforcement of, the liability arising from a breach." Id. At 61-62. The Gilvary decision was decided after, and in fact cites to, this Court's earlier decision in Napier v. Atlantic Coast Line Railroad, 22 U.S. 605 (1926)[2], the keystone case relied upon by all

[2] For a more detailed discussion of Napier, see *infra*, p. 10.

of the courts that have held that the LBIA preempts common law tort claims against manufacturers and suppliers. (See *e.g.* Law v. General Motors Corporation, 114 F.3d 908 (9th Cir. 1997), Forrester v. American Diesel Electric, 255 F.3d 1205 (9th Cir. 2000), Scheiding v. General Motors Corporation, 22 Cal.4th 471, 993 P.2d 996 (2000)).

Taken as a whole, the United States Supreme Court's decisions in Napier, Moore and Gilvary clearly define the scope of preemption under the LBIA and SAA. These statutes were intended to prescribe the standard (or duty, so to speak) to keep railroad locomotives and railcars safe for workers and travelers, and any state efforts to modify, enlarge or even duplicate these standards are absolutely preempted under the Supremacy Clause. However, these cases are also equally clear that the scope of the preemption is limited to the establishment of standards, and does not foreclose actions for compensation for injury suffered by railroaders and passengers. Thus, common law or statutory rights to recovery possessed by an injured worker are still viable to the extent they do not seek to impose a standard different from, or which in any manner conflicts with, the standards established by Congress through the LBIA and the SAA.

Even if this Court had not already specifically limited the preemptive scope of the LBIA and SAA in Moore, Rigsby and Gilvary, the general preemption principles developed by this Court would dictate that the Petitioners' claims are not preempted. In the last few decades this Court has developed an approach for deciding when state tort law causes of action fall within a preempted field. This approach involves a determination of whether "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984). This concept evolved into the more bright line determination of whether the state tort causes of action have "some direct and substantial effect" upon the focus of the federal regulatory scheme. English v. General Electric Co., 496 U.S. 72, 85-86 (1990)(relying upon Silkwood).

In Silkwood, this Court was asked to determine whether a punitive damages award on the plaintiff's common law claim for radiation poisoning was preempted by the Atomic Energy Act (AEA), 42 U.S.C. § 2011 *et. seq*. Three years earlier, in the case of Pacific Gas & Electric Co. v. State Energy Resources Conserve & Develop. Commission, 461 U.S. 190 (1983), this Court had already determined that Congress had intended the AEA to occupy the field of atomic safety. However, in according to this Court, this intent to occupy the field did not necessarily require the preemption of the plaintiff's claims. The Court decreed that the parameters of the preempted field:

> [S]hould not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of federal law.

Silkwood, 464 U.S. at 256. After analyzing the nature of the plaintiff's claims, this Court held that they were not preempted by federal law since the prosecution of the actions did not interfere with the standard of care established by the Act, or otherwise frustrate its objectives. Id., at 248-58. In many respects, the Silkwood decision is remarkably analogous to the situation which is currently before this Court. Under Napier, which the Respondents will surely argue stands for the proposition the Congress intended to preempt the field of locomotive safety, a court must still scrutinize the individual nature of the claims at issue to determine whether or not they frustrate the federal objective and fall within the preempted field. Much like the instant matter, the AEA was held to preempt the field with respect to the applicable standard of care, but not to preclude common law tort causes of action which do not conflict with or frustrate the controlling federal standards.

Simply put, the use of asbestos-containing products on railroad locomotives can be itself a violation of the LBIA, and it is undeniable that state courts have the authority to so decide, and they have done so regularly in FELA actions over the last three to

four decades. Thus, allowing state law tort causes of action to proceed against manufacturers for using asbestos in their products poses no risk to interstate commerce because it does not impose a standard that conflicts with the LBIA. To the contrary it is merely another enforcement mechanism, since the statute itself does not provide for direct causes of action. In short, the LBIA and SAA create the federal standard – which is supreme above all others – but the enforcement of these standards in tort causes of action is left to the existing remedies, namely the FELA in some circumstances, and common law tort causes of action in others.

2. THE PREEMPTIVE SCOPE OF THE LBIA DOES NOT ENCOMPASS CLAIMS AGAINST MANUFACTURERS

Federal preemption of state regulation comes in three different forms: first, express preemption, where Congress specifies preemption in the text of a particular act; second, field preemption, where federal regulation is so pervasive that one may reasonably infer that Congress intended to dominate the field and preclude state laws; and finally, conflict preemption, where federal and state law actually conflict, and a private party cannot possibly comply with both requirements. English v. General Electric Co., 496 U.S. 72, 78-79 (1990). In the presence of any of these three forms of preemption, state regulation must yield to the supremacy of federal law. See CSX Transp. Inc. v. Easterwood, 507 U.S. 658, 663 (1993).

Preemption is fundamentally a question of congressional intent. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988). When Congress has made its intent known through explicit statutory language, "the court's task is an easy one." English 496 U.S. at 79. However, the LBIA is devoid of any express statutory language on the subject of preemption, so any claims of preemption with regard to the LBIA must rest on one of the other two forms; field preemption or conflict preemption. In holding that the Petitioners' claims in this case are preempted, the West Virginia Supreme Court relied upon the doctrine of field preemption.

Field preemption operates to preempt state law where the state regulation in question regulates conduct in a field that Congress intended the federal government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the state to supplant it, or where an act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject. English, 496 U.S. at 79. Although state common law tort actions may sometimes rise to the level of preempted regulation, whether or not they fall within the scope of a preempted field is ultimately a matter of Congressional intent. Silkwood., 464 U.S. 238, 256 (1984). In recent decisions, this Court has developed an approach for deciding when state tort law causes of action fall within a preempted field which involves a determination of whether "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." Id. This concept evolved into the more bright-line determination of whether the state tort causes of action have "some direct and substantial effect" upon the focus of the federal regulatory scheme. English, 496 U.S. at 85-86 (relying upon Silkwood).

The burden of establishing congressional intent to preempt state regulation rests upon the party claiming preemption. De Canis v. Bica, 424 U.S. 351 (1976). Because the state regulation at issue in this case involves a state's historic police powers to regulate health and safety within its borders, the Respondents must overcome significant precedential obstacles. First and foremost, any court considering a preemption claim should "start with the assumption that the historic police powers of the States [are] not to be superseded" unless Congress has indicated that preemption is its "clear and manifest purpose." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Going even further, "such an assumption should reach the level of a strong presumption where the federal law is directed at subjects 'traditionally governed' by states, such as health and safety." Lorincie v. Southeastern Pennsylvania Transportation Authority, 34 F.Supp.2d 929, 931 (E.D. Pa. 1998), citing Easterwood, 507 U.S. at 664. As stated by the United States Supreme Court in Jones v. Rath Packing Co., 430

U.S. 519, 525 (1977), "[w]here ... the field which Congress is said to have preempted" includes areas that have "been traditionally occupied by the states," Congressional intent to supersede state laws must be "clear and manifest." Jones 430 U.S. at 525, quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The original LBIA became law in 1911. Through this Act, Congress conferred upon the Interstate Commerce Commission the power to regulate with respect to locomotive equipment. The original Act applied only to locomotive boilers, and it stated that it was, "[a]n act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

It has been determined that this original version of the Act did not evidence any intent by Congress to completely occupy the field of locomotive safety. See Atlantic Coast Line R. Co. v. Georgia, 234 U.S. 280 (1914). However, in 1915 the Act was amended and the provisions were extended to include "the entire locomotive and tender and all parts and appurtenances thereof." In 1924, Section 2 of the original Act was amended to read:

> That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the action service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. § 2 (1924). It is critical that this provision specifically mentions railroad carriers, but makes no mention of manufacturers.

Following the amendments to the LBIA, this Court had the opportunity to reconsider the preemptive effect of the LBIA in the case of Napier v. Atlantic Coast Line R. Co., 272 U.S. 605 (1926). In Napier this Court was asked to determine whether or not a Georgia regulation requiring automatic fire doors and cab curtains on locomotives was preempted by the LBIA. Considering the language of the recent amendments, this Court declared that unlike the focused requirements of the Safety Appliance Act (SAA), the power delegated to the Interstate Commerce Commission (ICC) by the Amended Locomotive Boiler Inspection Act was general and intended to occupy the field of locomotive safety. Napier 272 U.S. at 611. The Napier Court held that the preemptive effect of the LBIA precluded any state regulation in "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." Napier 272 U.S. at 611.

Although the Napier Court answered the question of whether Congress intended the LBIA to completely occupy the field, it left unanswered many questions involving the scope and nature of the field so preempted. After the determination is reached that Congress intended a piece of federal legislation to occupy an entire field, the next question which a court must ask is what is the scope or definition of the field. See *In re* TMI Litigation Cases Consol. II, 940 F.2d 832 (3rd Cir. 1991). In Napier, this Court was being asked to determine whether the LBIA preempted state laws which prohibited use within the state of locomotives not equipped with automatic fire doors and cab curtains. In the instant matter, this Court is being asked to consider whether or not the LBIA preempts common law tort actions against the manufacturers of locomotive parts or locomotives themselves for inherent defects, and if so, under what circumstances. Thus, the Respondents must still overcome the "strong presumption" that the causes of action brought by the Petitioners are not within the scope of the field that the federal government occupies, and they must further demonstrate that Congress's intent to preempt such claims was "clear and manifest."

Any analysis of Congressional intent must begin with the statutes in question, and as noted by the U.S. District Court for the Eastern District of Pennsylvania in the case of Lorincie v. Southeastern Pennsylvania Transportation Authority, 34 F.Supp.2d

929, 933, (E.D.Pa. 1998), which dealt with the preemptive effect of the LBIA, the LBIA on its face applies simply to "railroad carriers." Similar to the case at bar, Lorincie involved a railroad employee who filed suit against a manufacturer of locomotive parts, alleging that he was harmed by a defect in the product (a seat), and as in the instant matter, the manufacturer raised the issue of preemption. In analyzing the issue, the Lorincie court gave weight to the fact that the phrase "railroad carrier" (or its shorter form, "carrier") appears almost two dozen times in the few pages that the Act takes up in the U.S. Code, while there is no mention whatsoever of the phrase "manufacturer." Lorincie, 34 F.Supp. 2d at 933. The court stated, "[t]hus it appears from the text that even if Congress intended the BIA to preempt state common law claims against carriers (itself a contested point), it did not intend to preempt state common law claims against manufacturers..." Lorincie, 34 F.Supp. 2d at 933.

According to Lorincie, the structure of the Act also supports the conclusion that the LBIA was not intended to preempt common law claims against manufacturers. Among other things, the LBIA establishes the following standards with respect to railway safety relative to locomotives:

> It requires the Secretary to inspect locomotives used by carriers and ensure that carriers make their own inspections; establishes guidelines for noncompliance with the broad railroad safety standards; mandates the issuing by carriers of inspection and repair reports; requires carriers to report accidents and orders the Secretary to investigate the report on those accidents; permits the Secretary to publish investigative reports; requires carriers to file monthly accident reports; provides the Secretary with general investigative power and the authority to publish investigative reports; and precludes the use in civil actions of investigative reports made by a carrier or the Secretary.

Lorincie, 34 F.Supp 2d. at 933.

As pointed out in Lorincie, "it is clear that the BIA as a whole establishes a regulatory framework within which carriers and the

Secretary of Transportation – but not railroad manufacturers – operate." Lorincie, 34 F.Supp. 2d at 934. The court further adds, "[n]othing about the structure of the BIA indicates that Congress intended to bring railroad manufacturers within its regulatory web, let alone to preclude state common law actions against railroad manufacturers." Lorincie, 34 F.Supp. 2d at 934.

In conclusion the Lorincie court said of the LBIA, "[t]he Statute's text does not mention railroad manufacturers, its structure does not invite reading them into it, and federalism and history counsel leaving them out." Lorincie, 34 F.Supp. 2d at 934. In essence, the court found that given the requirement that Congress's intent to preempt state police powers be "clear and manifest," and the strong presumption against preemption in the area of health and safety, it would not broadly stretch the preemption umbrella of the LBIA to cover actions against a group of entities that are not even mentioned (or arguably envisioned) in the statute.

The Lorincie court's interpretation of the scope of the field preempted by the LBIA is in keeping with the plain language of the LBIA. It makes no logical sense to attempt to read into statutes words that are not there, and the Lorincie court's holding stays true to the proposition that the field that is preempted should be narrowly defined.

In concluding that common law claims against manufacturers are preempted, the West Virginia Supreme Court relied upon a string of cases including, Law v. General Motors Corporation, 114 F.3d 908 (9th Cir. 1997), Forrester v. American Diesel Electric, 255 F.3d 1205 (9th Cir. 2000), Scheiding v. General Motors Corporation, 22 Cal.4th 471, 993 P.2d 996 (2000), and others. However, like a string of dominos, these cases all rely upon a misapplication of federal preemption law first espoused in Law. Much like the case at bar, Law involved injured railroad employees seeking to recover from locomotive part manufacturers through state common law tort claims. In holding that these claims were preempted by the LBIA, the court focused on what it saw as one of the underlying purposes of the LBIA, uniform federal railroad regulation. Law at 911 – 12. The Law court stated, "If each state were to adopt differing liability triggering standards, manufacturers would have to sell locomotives and cars whose

equipment could be changed as they crossed state lines..." later adding, "This would transfer the regulatory locus from the Secretary of Transportation to the state courts..." Law at 911-12. The court was correct in its speculation that allowing state court claims against manufacturers could conflict with the established federal law and could also frustrate interstate commerce. However, it incorrectly applied federal preemption law and reached an unjust and incorrect result.

As already discussed, black letter preemption law requires that there be a "strong presumption" against preempting state laws in the traditional police power areas of health and safety, and that Congress's intent to do so must be "clear and manifest." However, the Law court went beyond these guidelines when it focused on the possible effect of state regulation of part manufacturers on the federal goals affected by the LBIA. It is certainly true that if the LBIA did not have any preemptive effect on state regulation of manufactures, a locomotive part manufacturer could be placed in the unique position of being held liable in state court under the theory of products liability for including a component part which was required by the LBIA. However, the analysis of such preemptive effect in this type of scenario does not properly belong to the doctrine of field preemption, instead the analysis should be made under the built-in checks and balances provided for under conflict preemption. As mentioned above, conflict preemption occurs when federal and state laws actually conflict, and a private party cannot possible comply with both requirements. English v. General Electric Co. at 78-79. Thus, when a state regulation conflicts with the federal standards clearly directed at railroad carriers such that a private party is unable to comply with both, the state regulation must yield to the supremacy of the federal regulation under the doctrine of conflict preemption. However, in situations such as the present case, when the federal regulation clearly directed at railroad carriers and the state regulation allowing common law tort recovery against manufacturers are not in direct conflict, then preemption does not occur.

Law further states that preemption was justified because the plaintiffs had another avenue available to them, in that they were railroaders and therefore they could recover in actions against their employer under the FELA. Law at 912. However, this argument

ignores a number of factual scenarios in which a plaintiff will not have any other avenue of recovery available to him. One of these scenarios, which has actually arisen in the past, is the scenario in which the injured plaintiff is not a railroad worker and the only person against whom he can recover is the manufacturer of the locomotive part. This was the scenario presented in Forrester v. American Dieselelectric, Inc., 255 F.3d 1205 (9th Cir. 2001). In Forrester, a non-railroad employee was injured when a locomotive crane operated by his employer dragged a large metal beam across his leg. Forrester's employer was not a "common carrier by rail", and therefore no FELA action was available to him, instead he was forced to pursue a product's liability action against the manufacturer of the crane. The court held that the LBIA was applicable to the locomotive crane in question, and therefore under Law the claim was preempted by the Act. Forrester at 1207-10. The Forrester Court seemingly laments its decision to preclude recovery, but found no reason to restrict the preemptive force of the Act. Forrester at 1210.

Yet another affect of the Law and Forrester analysis is the preclusion of contribution and indemnification claims by the common carriers against the manufacturers who subjected them to liability in the first place. Nowhere in the body of the LBIA, or in the legislative history, can there be found even the slightest evidence to establish that it was the "clear and manifest" intent of Congress to preclude "common carriers" from filing contribution claims against manufacturers subjecting them to liability to their employees under the LBIA and the FELA. Although there are no decisions from this Court directly addressing the issue of a railroad's ability to obtain indemnification from a manufacturer or supplier for liability it sustained under the LBIA, this Court did address the issue of indemnification for FELA liability generally in the case of Norfolk & Western v. Ayers, 538 U.S. 135, 162-63 (2003). It is important to note that Ayers specifically mentions the case of Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2001)(discussed later) as standing for the proposition that railroads may seek indemnification from manufacturers and suppliers, and the Engvall case specifically dealt with the issue of a railroad's liability under the LBIA. If, as the Ayers case suggests, a railroad is able to seek indemnification from a manufacturer or supplier for

its LBIA liability, it logically follows that an injured railroader should be able to pursue such an action directly.

The West Virginia Supreme Court acknowledged that this Court has "narrowed the scope of federal preemption in several recent cases," but still concluded that it must find preemption because of the "voluminous foreign precedent on this specific question." *In re* West Virginia Asbestos Litigation, 592 S.E.2 at 824 n. 4. However, the recent decisions of this Court are clear, and all of the wrongfully decided "foreign precedent" to the contrary does not that change the fact that the Petitioners' claims should not be preempted because they do not conflict with or frustrate the federal scheme at issue. For this reason, this Petition should be granted.

3. THE PREEMPTIVE SCOPE OF THE LBIA DOES NOT ENCOMPASS LOCOMOTIVES THAT ARE NOT IN USE

It is axiomatic that if a federal scheme does in some manner act to allow "field preemption", lawsuits arising from situations that are outside of "the field" can not be preempted. This is of critical importance in discussing preemption issues pursuant to the LBIA, because by its very terms, the Act only applies when a railcar or locomotive is in "use or allowed to be used." 49 U.S.C.A. § 20701(LBIA), See also, Angell v. Chesapeake & Ohio Ry. Co., 618 F.2d 260 (4th Cir. 1980). In other words, if the LBIA has any preemptive affect whatsoever, the field preempted does not include situations where locomotives or railcars are not "in use."

What constitutes "in use" has been the subject of much debate by the courts which have considered this issue, and they have responded by announcing various tests. For example, the 5th Circuit Court of Appeals, in Trinidad v. Southern Pacific Transportation Co., 949 F.2d 187 (5th Cir. 1991), a Safety Appliance Act (SAA) case, held that a train in the process of being prepared for departure is not in use until it has been assembled and all pre-departure inspections have been completed. Trinidad, 949 F.2d. at 189. However, the 4th Circuit has proposed a type of "totality of the circumstances" test in determining whether or not a train is in use. In Deans v. CSX Transportation, Inc., 152 F.3d 326

(4th Cir. 1998), an SAA case, the court held that "to determine whether a train is 'in use' for purposes of the FSAA, the primary factors to be considered are where the train was located at the time of the accident and the activity of the injured party." Deans, 152 F.3d. 329 (citing Pinkham v. Maine Cent. R.R. Co., 874 F.2d 875, 882 (1st Cir. 1989)). This same logic has been held to apply in LBIA cases as well. "[B]ecause the 'in use' language in the Boiler Inspection Act is identical to the language in the FSAA, courts have applied case law interpreting the Boiler Inspection Act to the FSAA as well." Phillips v. CSX Transportation, Inc., 190 F.3d 285, 288 n.2 (4th Cir. 1999). In fact, in Pinkham, a BIA case relied upon by Deans, the Pinkham court held the "determinative factors" in the application of the BIA are "the location of the locomotive at the time of the injury and the activity of the injured party," Pinkham, 874 F.2d at 882, the exact factors relied upon by the Deans court in evaluating "in use" under the SAA.

Regardless of what standard is used in evaluating whether locomotives that are being serviced or repaired are considered to be "in use", for purposes of the LBIA, Pinkham, 874 F.2d at 881 (LBIA case); Steer v. Burlington Northern, 720 F.2d 975 (8th Cir. 1983) (pipefitter injured while repairing a locomotive that could not move was not within the ambit of the BIA); Estes v. Southern Pacific Transportation Co., 598 F.2d 1195 (10th Cir. 1979) (Employee injured while locomotive in roundhouse not covered by BIA) (citing other cases), the reason for the "in use" distinction is clear. "The purpose of the 'in use' limitation is to give railcar operators [or locomotive operators] the opportunity to inspect for and correct safety appliance defects before the FSAA [or LBIA] exposes the operators to strict liability for such defects." See Angell, 618 F.2d at 262.

Many of the Petitioners herein were exposed, at least in part, to the Respondents' asbestos-containing products during the course of their employment while locomotives and/or rail cars were not in use. For example, Petitioners whose crafts concern primarily rail car and/or locomotive car repair (*i.e.* carman, car inspector, pipefitter, electrician, laborer, helper, equipment repairman, sheetmetal worker, mechanic, boilermaker, *etc.*) would have been exposed to asbestos primarily (if not exclusively) while repairing trains on shop tracks, roundhouses, or repair facilities. Petitioners

may have also come into contact with products manufactured by Respondents when those products were not on trains or rail cars at all. See Southern Ry. Co. v. Lunsford, 297 U.S. 398, 402 (1936) ("Whatever in fact is an integral or essential part of *completed* locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute [LBIA]. (Emphasis added)). Varney v. Norfolk & Western Ry. Co., 899 F.Supp. 280, 282 (S.D. W.V. 1995) (As a matter of law when a part is detached from a locomotive, it is no longer considered an appurtenance of that locomotive for LBIA purposes). During those times, the LBIA does not apply, and accordingly can have no preemptive effect. Because the decision below ignored this important distinction, this Petition should be granted.

B. THE WEST VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT, AND OF A UNITED STATES COURT OF APPEALS

The decision of the West Virginia Supreme Court in In re West Virginia Asbestos Litigation directly conflicts with the decision of the United States Court of Appeals for the Seventh Circuit in Adkins v. Illinois Central Railroad Company, 326 F.3d 828 (7th Cir. 2003) and the decision of the Supreme Court for the State of Minnesota in Engvall v. Soo Line R.R. Co., 632 N.W.2d 560 (Minn. 2001). Although there are of a number of other state and federal decisions in accord with In re West Virginia Asbestos Litigation, these decisions just further illustrate the necessity of having this Court resolve this matter once and for all.

In Adkins, a group of injured train passengers brought suit against multiple defendants, including a locomotive manufacturer, asserting the common law claims of negligence and strict liability. The defendants attempted to remove the case to federal court under the doctrine of "complete preemption," arguing that Congress has intended to include such claims within the preempted field of the LBIA. Id. at 830. The court rejected the defendants' arguments, stating "[w]e see nothing in the Locomotive Inspection Act to indicate that Congress clearly intended completely to replace state law with federal law ... That is what would be required to create

'complete' or 'field' preemption, as opposed to the more routine conflict preemption." Id., at 835. The court noted however, that just because the plaintiffs' claims did not fall within the scope of a preempted field did not mean that they were not preempted, adding "ordinary conflict preemption may well exist with respect to some or all of the claims." Id. Although the discussion of preemption principles in Adkins is limited, it can be assumed that the court was not implying that Congress did not intend to occupy the field of locomotive safety standards, but rather that the plaintiffs' common law tort causes of action fall outside of the scope of this preemptive field, and are thus governed by the principles of conflict preemption rather than field preemption. In this manner, the reasoning of the 7th Circuit is in perfect accord with this Court's decisions in Gilvary and Moore, and the more general preemption analysis developed in Silkwood.

In Engvall, an injured locomotive engineer brought an FELA action against his "common carrier" employer, who in turn sought contribution against an equipment manufacturer for violations of the LBIA. The manufacturer defended the action on the grounds that a third-party can not be liable for contribution to another party unless it would have also been liable to the first-party plaintiff. Engvall, 632 N.W.2d at 568. The manufacturer then argued that since any claim asserted against it by the first-party plaintiff would have been preempted by the LBIA, it could have no liability to the party seeking contribution. Id. at 568. The court in Engvall rejected this argument, stating that the plaintiff in question could have brought a state common law action directly against the manufacturer for violations of the LBIA, and therefore the defendant had the right to seek contribution against it. Id. As *In re* Asbestos is in direct conflict with both Adkins and Engvall, this Petition should be granted to resolve this conflict.

II. CONCLUSION

Petitioners request that this Petition for Writ of Certiorari be granted by this Honorable Court to remedy this error, and to clarify this important issue of federal law.

Respectfully submitted,

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Appendix A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION
MASS LITIGATION PANEL
(Consolidated Railroad Cases)

Civil Action No.: 02-C-9004
(Hon. Arthur M. Recht, Judge)

ORDER

On May 6, 2005, cam Defendant Old Orchard Industrial Corp., Individually and as Successor in Interest to Vapor Corporation (hereinafter "Vapor"), by its counsel, Jon B. Orndorff, Esquire, of the law firm of Baker & Lancianese, Defendant Viad Corp., (hereinafter "Viad"), by its counsel, Stephen M. Schwartz, Esquire, of the law firm of Hendrickson & Long, P.L.L.C., and the Plaintiffs, by their counsel Robert F. Daley, of the law firm of Peirce, Raimond & Coulter, P.C., for a Hearing on Viad's Motions for Summary Judgment and Vapor's Renewed Motions for Summary Judgment in the above-referenced consolidated civil action.

Based upon the pleadings and filings of the parties, the applicable law, the arguments of the parties, and the entire court file, this Court here **FINDS** as follows:

1) The parties agree that the claims asserted against these Defendants are based on the alleged exposure to asbestos from locomotives and locomotive parts manufactured, sold, and/or supplied by Defendants Vapor and Viad.

2) The West Virginia Supreme Court of Appeals has determined that any and all tort claims based on the alleged exposure to asbestos from locomotives and locomotive parts are preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. §20701 *et seq.* Syl. Pt. 3, In re: West Virginia Asbestos Litigation, 592 S.E.2d 818 (W.Va. 2003)

3) This Court is bound by the Constitution of the State of West Virginia to follow the West Virginia Supreme Court of Appeals' rulings.

4) Each and every individual claim asserted against Defendants Vapor and Viad in the above-referenced consolidated civil action is preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S. C. § 20701 *et. seq.*

For the foregoing reasons, the Court hereby **GRANTS** Viad's Motion for Summary Judgment and Vapor's Renewed Motions for Summary Judgment and **ORDERS** that any and all claims asserted against Defendants Vapor and Via in the above-reference consolidation civil action are hereby **DISMISSED**, with prejudice.

The Clerk of the Court is directed to send certified copies of this Order to all counsel of records at the addressed below.

ENTERED: This 25th day of July, 2005.

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Judge Arthur M. Recht

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ASBESTOS PERSONAL INJURY LITIGATION
MASS LITIGATION PANEL
(Consolidated Railroad Cases)

LAWRENCE ANDREWS, *et al.*,
Plaintiffs

v.

Civil Action No. 02-C-132K
(Kanawha County, WV)

GENERAL MOTORS COMPANY, *et al.*,
Defendants.

ORDER

On this day, came defendant, General Motors Corporation ("GM"), by its counsel, Michael B. Victorson and Jackson Kelly PLLC and come the plaintiffs, by their counsel, Robert F. Daley and Peirce, Raimond & Coulter, P.C., for a hearing upon the oral Motion for Summary Judgment of GM in each of the above-styled civil actions. The said Motion was based upon the same factors and legal arguments asserted and argued by counsel for Old Orchard Industrial Corp., Individually and as Successor in Interest of Vapor Corporation ("Vapor") in its Renewed Motion for Summary Judgment and Viad Corp. ("Viad") in its Motions for Summary Judgment and at a hearing held on May 6, 2005 in most of the same cases. GM adopted and incorporated the arguments and authorities of Vapor and Viad by reference. Counsel for Plaintiffs agreed to such adoption and incorporation, the legal issues and relevant facts relative to GM being identical to those of Vapor and Viad herein and so as not to burden the Court with additional, virtually identical, paper filings. The Court accepts and appreciates the same.

Based upon the pleadings and filings of the parties, the applicable law, the arguments of the parties, and the entire court file, this Court hereby **FINDS** as follows:

1) The parties agree that the claims asserted against GM are based on the alleged exposure to asbestos from locomotives and locomotive parts manufactured, sold, and/or supplied by GM.

2) The West Virginia Supreme Court of Appeals has determined that any and all tort claims based on the alleged exposure to asbestos from locomotives and locomotive parts are preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.* Syl. Pt. 3, In re: West Virginia Asbestos Litigation, 592 S.E.2d 818 (W. Va. 2003)

3) This Court is bound by the Constitution of the State of West Virginia to follow the West Virginia Supreme Court of Appeals' rulings.

4) All of the claims asserted against GM in each and every one of these civil actions are preempted by federal law under the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et. seq.*

For the foregoing reasons, the Court hereby **GRANTS** the said Motion for Summary Judgment of General Motors Corporation and **ORDERS** that any and all claims asserted against defendant General Motors Corporation in the above styled civil actions are hereby **DISMISSED**, with prejudice, and General Motors Corporation is hereby **DISMISSED** as a party defendant from each of the above styled civil actions with prejudice. The objections and exceptions to the substantive rulings of the Court herein by the plaintiffs are noted and preserved.

The Clerk of the Court is directed to send certified copies of this Order to all counsel of record at the addressed below and to cause a copy of this Order to be filed in each of the above styled civil actions.

ENTERED: This 17th day of June, 2005.

_____

Judge Arthur M. Recht

Appendix B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th of March 2006, the following order was made and entered:

In Re: Asbestos Personal Injury Litigation
Mass Litigation Panel
Kanawha County Civil Action No. 02-C-9004

No. 060036

On a former day, to-wit, January 6, 2006, came the petitioners, Ronald Lee Abbott, et al., by D. Aaron Rihn, Peirce, Raimond & Coulter, P.C., their attorney, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 27th day of July, 2005, with the record accompanying the petition. Thereafter, on the 30th day of January, 2006, came the respondents, Old Orchard Industrial Corp., by Jon B. Orndorff, Baker & Lancianese, its attorney; General Motor Corporation, by Michael B. Victorson, Jackson Kelly PLLC, its attorneys; and Viad Corporation, by Stephen M. Schwartz, Hendrickson & Long, P.L.L.C., its attorney, and presented to the Court their written response thereto.

Upon consideration whereof, this Court is of the opinion to and doth hereby refuse said petition for appeal. Chief Justice Davis disqualified.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

Appendix C

THE LOCOMOTIVE BOILER INSPECTION ACT

49 U.S.C. § 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances --

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;
(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter;
(3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20702. Inspections, repairs, and inspection ad repair reports

(a) General – The Secretary of Transportation shall --

(1) become familiar, as far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;
(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals;
(3) ensure that every railroad carrier makes inspections of locomotives and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part or appurtenance is used again.

(b) Noncomplying locomotives, tenders, and parts. --

(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or

operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance, the carrier may submit a written request for reinspection. On receiving the request, the Secretary shall provide for reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part or appurtenance is in compliance. Id the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be sued only after it is –

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) Reports. -- A railroad carrier shall make and keep in the way the Secretary prescribes by regulation, a report of every --

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) Changes in inspection procedures. -- A railroad carrier may change a rule or instruction governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the

Secretary approves a request filed by the carrier to make the change.

49 U.S.C. § 20703. Accident reports and investigations.

(a) Accident reports and scene preservation. -- When the failure of a locomotive, tender, or locomotive or tender part or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender –

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and
(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(b) Investigations. – The Secretary shall –

(1) investigate each accident and incident reported under subsection (a) of this section;
(2) inspect each part affected by the accident or incident; and
(3) make a complete and detailed report on the cause of the accident or incident.

(c) Publication and use of investigation reports.—When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

CERTIFICATE OF SERVICE

I hereby certify that a rue and correct copy of Petitioner's PETITION FOR WRIT OF CERTIORARI was served via first class mail, postage prepaid, this 13th day of June 2006, upon the following:

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